

Respondent requested the Appeals Board to review the nature and extent of claimant's injury and disability as it contends that claimant sustained a scheduled injury

only. Also, respondent contends that claimant declined an accommodated job that had been offered him.

Claimant, on the other hand, contends the Judge erred by reducing his permanent partial general disability benefits by his disability annuity.

The only issues before the Appeals Board on this appeal are:

- (1) What is the nature and extent of claimant's injury and disability?
- (2) Are disability annuity benefits considered retirement benefits under K.S.A. 44-501(h)?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds:

- (1) On January 21, 1996, Carl G. Hodges, Jr., injured his left ankle and mid back when he fell while attempting to rescue a child from a house fire. At the time, Mr. Hodges was a lieutenant in the City of Wichita Fire Department.
- (2) The parties stipulated that the accident arose out of and in the course of employment.
- (3) Mr. Hodges immediately sought medical treatment for both his left ankle and back. He received only conservative treatment for the back. But the left ankle required surgery.
- (4) The Appeals Board finds that Mr. Hodges permanently injured both his left ankle and back in the January 21, 1996 accident. That conclusion is supported by the testimonies of both Pedro A. Murati, M.D., and Kernie W. Binyon, M.D. The only other doctor to testify, orthopedic surgeon Naomi Shields, M.D., did not and could not provide an opinion regarding whether Mr. Hodges injured his back in the January 1996 accident as she never examined it.
- (5) Shortly after the accident, Mr. Hodges returned to work for the City. He was then off two weeks when he had the ankle surgery in March 1996. In May 1996, the surgeon released Mr. Hodges to return to work with permanent medical restrictions against kneeling, squatting, and climbing stairs and ladders in emergency situations with full gear or weight. Because of the medical restrictions, Mr. Hodges cannot perform his former firefighter duties.
- (6) Before leaving the City's employment, the Fire Department offered Mr. Hodges the position of manning the Mobile Air Truck. That individual supports firefighters at the scene of a fire by providing and refilling air bottles. That individual also provides the firefighters

water and Gatorade. Mr. Hodges' testimony is uncontroverted that the air packs weighed approximately 50 pounds and the large water bottles weighed approximately 70 pounds.

(7) Both Drs. Murati and Binyon indicated that Mr. Hodges should not perform the mobile air support job. Dr. Binyon, who is Mr. Hodges' personal physician and who also formerly worked closely with the Wichita Fire Department treating firefighters, testified that Mr. Hodges should not lift over 20 to 25 pounds. Dr. Murati, who is board certified in physical medicine and rehabilitation, testified that the mobile air support position would exceed Mr. Hodges' 35 pound weight limit.

(8) The City of Wichita provides several different annuities to its police and firefighters, including a service-connected disability annuity that pays 75 percent of an individual's salary. That benefit is paid when a police officer or firefighter is permanently disabled from performing that individual's job.

(9) Mr. Hodges applied for the service-connected disability annuity. After approval by a disability screening committee, that annuity commenced December 18, 1996, paying \$2,282.03 per month. Mr. Hodges' last day of work for the City was December 17, 1996.

(10) Since leaving the City's employment, Mr. Hodges has neither worked nor looked for employment with any employer.

(11) Judge Frobish found that Mr. Hodges lost the ability to perform 31 percent of the work tasks that he previously performed in the 15 year period before the accident. That conclusion is based upon Dr. Murati's testimony and it is affirmed.

(12) Judge Frobish also found that Mr. Hodges retains the ability to earn approximately \$325 per week. That conclusion is supported by the testimony of human resources consultant Jerry D. Hardin and it is also affirmed.

#### **CONCLUSIONS OF LAW**

(1) The Appeals Board affirms Judge Frobish's conclusion that Mr. Hodges has a 49 percent permanent partial general disability. Because his is an "unscheduled" injury, Mr. Hodges' permanent partial general disability is determined by averaging the percentage of tasks loss with the percentage difference between pre- and post-injury wages. K.S.A. 44-510e provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the

injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute, however, must be read in light of Foulk<sup>1</sup> and Copeland<sup>2</sup>. In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

(2) As indicated above, Mr. Hodges has neither worked nor looked for employment since December 17, 1996. Pursuant to Copeland, the Appeals Board concludes that a post-injury wage must be imputed. Comparing the \$325 per week that Mr. Hodges retains the ability to earn and the \$971.53 per week that the parties agreed Mr. Hodges was earning before the January 1996 accident yields a 67 percent difference. Averaging 67 percent with the 31 percent tasks loss yields a 49 percent permanent partial general disability.

(3) The disability annuity should not reduce Mr. Hodges' permanent partial general disability benefit.

The Workers Compensation Act provides that social security retirement benefits and certain other retirement benefits shall reduce an individual's workers compensation benefit. K.S.A. 44-501(h) provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement

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<sup>1</sup>Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>2</sup>Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

The issue now before the Appeals Board is whether the disability annuity that Mr. Hodges now receives from the City is a retirement benefit as contemplated by K.S.A. 44-501(h). The Appeals Board concludes that it is not.

The Appeals Board finds that in common parlance disability benefits are distinct from retirement benefits. Even the City of Wichita notes the distinction in its benefits plan as the definitions, qualifications, and procedures to obtain them are clearly different. Further, the benefits plan provides that a disability annuity will eventually convert to a retirement annuity. Addressing the identical issue that is now before us, the Appeals Board has previously stated:

The Appeals Board nevertheless concludes the benefits paid claimant should not be treated as retirement benefits for purposes of K.S.A. 44-501(h). The Board's conclusion is based on what it considers a commonly accepted meaning of the term "retirement benefit". The Board construes "retirement benefit" as a benefit paid by reason of age and/or years of service. Retirement benefits are not dependent on disability. In this case claimant is eligible only because of his injury and disability. In contrast, eligibility for retirement is based only on age and/or years of service.<sup>3</sup>

In common parlance, disability benefits are those that are paid because of incapacity. But retirement benefits are paid because of age and years of service. The insurance industry, as well as the City's benefit plan, recognizes that disability and retirement are different concepts. The terms are not synonymous.

In another case, the Appeals Board held that social security disability benefits are not retirement benefits as contemplated in K.S.A. 44-501(h).<sup>4</sup> That holding was affirmed by the Court of Appeals in an unpublished decision.

(4) At Dr. Binyon's deposition, the parties introduced the doctor's entire medical file pertaining to Mr. Hodges consisting of several hundred pages. For future reference, the parties are requested to introduce only those records that are both relevant and material to the issues before the Division.

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<sup>3</sup>Green v. The City of Wichita, Docket No. 190,467 (August 1997).

<sup>4</sup>Gadberry v. R.L. Polk & Company, Docket No. 193,516 (July 1996).

**AWARD**

**WHEREFORE**, the Appeals Board modifies the Award to set aside the reduction in permanent partial general disability benefits by the disability annuity.

Carl G. Hodges, Jr. is granted compensation from the City of Wichita for a January 21, 1996, accident and a 49% permanent partial general disability. Based upon a \$971.53 average weekly wage, Mr. Hodges is entitled to receive 203.35 weeks of permanent partial general disability benefits at \$326 per week, or \$66,292.10.

As of January 4, 1999, there is due and owing Mr. Hodges 154 weeks of permanent partial general disability compensation in the sum of \$50,204. The remaining balance of \$16,088.10 is ordered paid for 49.35 weeks at the rate of \$326 per week until fully paid or further order of the Director.

The Appeals Board adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
Edward D. Heath, Jr., Wichita, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director